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No. 80-86

In the Supreme Court of the United States

October Term, 1980

ROBERT DUCK, *et al.*,
Petitioners,

vs.

JOYCE HARLESS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Respondents accept the Statement of the Case appearing in the Petition for Writ of Certiorari as substantially correct. There are certain facts, however, that were either not stated or misstated by Petitioners. These facts are enumerated below.

I. The Petitioners failed to point out that the District Court found Petitioners had intentionally discriminated against women prior to March 24, 1972, the date Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq. was made applicable to municipalities (Pet. App. 24); and, this finding was left undisturbed by the Sixth Circuit. This finding was based on three of Petitioners' employment practices: (1) the maintenance of separate entry level job classification for men and women; (2) the employment of only a minimal number of women; and (3) the limitation on police functions performed by women (Pet. App. 4-5).

II. The District Court found disparity in the level of employment of male and female police officers after 1972 (Pet. App. 26). Two portions of the 1972 patrolman's examination were found to have a significantly disparate impact between male and female applicants. Those portions were the physical agility test and the structured oral interview (Pet. App. 29).

III. The Sixth Circuit found the physical agility test the major flaw with the 1972 examination (Pet. App. 7). In holding that the Petitioners failed to meet their burden of showing the test valid and job-related the Court found four defects. First, despite the recognition that some physical activity was identified as necessary to the job of police officer, Petitioners offered no definition of the amount of physical strength or extent of physical exertion required. Second, the test had never been validated by any of the cities who then used it, nor did the Petitioners attempt to do so until 1974. Third, the record lacked any justification for the types of exercises chosen or passing marks for each exercise. Fourth, when the test was omitted from later examinations the record disclosed no detrimental effect on the police department (Pet. App. 7-8).

IV. The structured oral interview was also found not to be job-related. The interview was flawed due to a lack of standardized conditions, rater bias, and a lack of criteria on which to judge the degree of correctness of an applicant's answers (Pet. App. 8). Further, the Court rejected the Petitioners' attempt to validate the structured oral interview based on its having some correlation with performance at the police academy as Petitioners' own expert found reason to question the existence of a relationship between success in training and success on the job (Pet. App. 8).

V. The Sixth Circuit found two tests that did not have a disparate impact between male and female applicants and were better bases for employee selection (Pet. App. 9). Those tests were biographical data and written intelligence tests.

VI. Both lower courts found the Petitioners' internal employment practices were discriminatory (Pet. App. 5-6, 37). It must be pointed out that Petitioners did not rely on either a bona fide occupational qualification or business necessity; rather, they maintained throughout that they did not discriminate subsequent to March 24, 1972. The undisputed facts, however, show: (1) separate entry level job classifications were maintained for men and women until November of 1974; (2) policewomen hired prior to November of 1974 were not changed to the classification of patrol officer until April of 1976; (3) women were limited to the Crime Prevention Bureau/Juvenile Section as late as December of 1976 being denied transfer into other departments having greater promotional opportunities (Pet. App. 5-6).

VII. The Sixth Circuit remanded the case for trial on an appropriate remedy including attorney's fees.

REASON WHY THE WRIT SHOULD BE DENIED

Petitioners seek this Court's review of five questions. Petitioners do not claim any conflicts exist, rather they assert, without argument, that the questions presented are important. However, none of the questions are of sufficient importance to warrant review by this Court. More importantly, the questions are not raised by either the decision or record below and are not properly before this Court. Taking the questions in the order in which the Petitioners present them, it is evident the Petition should be denied.

Grace Period

Petitioners' first question, which asks whether municipalities are entitled to a grace period during which time employment practices can be brought into compliance with Title VII, does not warrant review by this Court.

This question was not raised in the courts below as Petitioners did not defend any of their discriminatory practices as necessary to a program of gradual compliance. The Petitioners did not begin a plan of compliance in 1972. The record indicates that the discriminatory practices of separate entry level classifications continued until late in 1974. The permanent assignment of female employees to but one department having fewer promotional opportunities continued at least until December of 1976. Therefore, the question of a grace period for municipalities acting with "deliberate speed" to conform to the mandate of Title VII was not decided by the Sixth Circuit and is not raised by the record.

Even if raised, the question does not warrant review as no conflict exists over its resolution and it lacks importance. The unstated premise in Petitioners' assertion of the question's importance is that municipalities have relied on the assumption of such a grace period. Given that 42 U.S.C. section 1983 prohibited discriminatory conduct under color of state law long before March 24, 1972, the proposition that municipalities have detrimentally relied upon a grace period, or are justified in needing one, is absurd. Further, the fact that Title VII has been applicable to public employees for more than eight years undercuts the question's continued importance.

Moreover, there is nothing in the 1972 amendments of Title VII to suggest Congress intended to permit public employers to delay compliance. The inference that Con-

gress deliberately withheld any grace period is supported by the express grant of a one year grace period to private employers in 1964, Title VII of the Civil Rights Act of 1964, Pub. L. No. 86-352 section 716(a), 78 Stat. 259 (1964), and a failure to grant public employers a similar grace period in 1972.

The Physical Agility Test

Petitioners' second question is whether the Petitioners had to identify the exact amount of strength necessary to be a police officer to justify testing job applicants with a physical agility test that had a disparate impact on women. Again, Petitioners have failed to demonstrate any grounds for this Court's review.

This question is not raised by the decision below. The Sixth Circuit did not find the Petitioners failed to meet their burden of showing the validity of this test solely because they failed to identify the exact amount of strength necessary to be a police officer. The physical agility test was lacking in several respects. First, it was not shown to be the best test then available. It had never been validated and Petitioners did not begin to determine its validity until 1974. Second, no justification for the types of exercises chosen nor the passing marks for each was offered. Third, no detrimental effect on the police department was shown to occur when the test was deleted from subsequent exams.

Even if the lower court had rested its determination solely upon the Petitioners' failure to identify the amount of strength required of police officers, there is no question warranting this Court's review. This Court's own prior decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) is controlling.

In *Dothard* this Court found the employer failed to rebut a prima facie case of discrimination by validating a height and weight requirement for the position of correctional counselor. The Court held the requirement invalid not because height and weight do not tend to measure strength, but because there was no showing that the height and weight required related to "the requisite amount of strength thought essential to good job performance". *Id.* at 321. Nothing in the opinion, however, suggests a test which measured strength directly would be valid without a determination of the amount of strength required.

The Sixth Circuit was correct in reading *Dothard* as requiring some determination of the amount of physical strength or extent of physical exertion required. The result reached seems particularly just when it is noted that up until the time of the trial the Petitioners did not evaluate job performance nor require on-going physical fitness of police officers.

Moreover, the determination by this Court of the validity of this test is not sufficiently important for review. The question turns on the particular facts of this examination, the exercises and passing marks for each. Its resolution is of no value outside this narrow context.

Pre-1972 Discrimination

The third question also does not warrant the Court's review. It concerns the probative value of discriminatory acts occurring prior to the amendment of Title VII making the act applicable to public employers.

This question, too, is not raised by the decision below. Although the opinion below contains language to the effect that pre-Act discrimination was very probative, the court did not rely on evidence of discrimination prior to 1972.

It finds specific acts of discrimination occurring five years after the 1972 amendment of Title VII.

The Structured Interview

Petitioners' fourth question arises out of the Sixth Circuit's finding the structured oral interview was not job-related. This Court is asked to decide whether it is permissible for a City to test applicants for identified characteristics necessary for successful completion of a job-training program or must they test identified characteristics necessary for job performance. Once again Petitioners seek this Court's review of a claimed error not squarely presented by the decision below without explanation of why the question merits review.

The Sixth Circuit did not find the structured oral interview invalid solely because it was an indication of police academy performance. The Court noted Petitioners' own expert questioned the relationship between academy performance and good job performance. Further, the method of conducting the test was suspect as there was evidence of a lack of standardized conditions, rater bias and a lack of criteria on which to judge the degree of correctness of an applicant's answers.

Even if the Sixth Circuit had rested its invalidation of this test on the proof of its relationship to academy performance instead of job performance, the Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976) does not make it error. *Davis* is not a Title VII case and its acceptance of a test which validly predicted training course performance by requiring a minimum standard of literacy is not controlling.

Furthermore, an unbroken line of precedent under Title VII beginning with this Court's decision in *Griggs v.*

Duke Power Co., 401 U.S. 424, 426 (1971) makes it clear employers must rely only on criteria "significantly related to successful job performance".

Less Discriminatory Alternatives

Petitioners' final question does not merit review by this Court because the decision below is correct without regard to its resolution and therefore this Court is not likely to reach it regardless of its merit.

This Court is asked to decide whether an employment test having no disparate impact between male and female applicants is an acceptable alternative to tests with such an impact, where the alternative discriminates against black job applicants.

In a Title VII action the question of less discriminatory alternatives arises only after the employer meets the burden of showing that employment tests that have a discriminatory impact are job-related. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-2 (1973). In this case the lower court correctly found the employment tests were not job-related; therefore, the question of a less discriminatory alternative is not raised.

Further, the record contains no showing of a statistical disparity between the performance of blacks and whites on the test. Further, biographical data was also found to be a better alternative basis for selection. The record contains no reference to a disparate impact between blacks and whites on the basis of biographical data.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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